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IN THE
Supreme Court of the United States

OCTOBER TERM, 1942

NO. 877

WERT T. REED AND F. F. DOLLERT,
Petitioners
v.

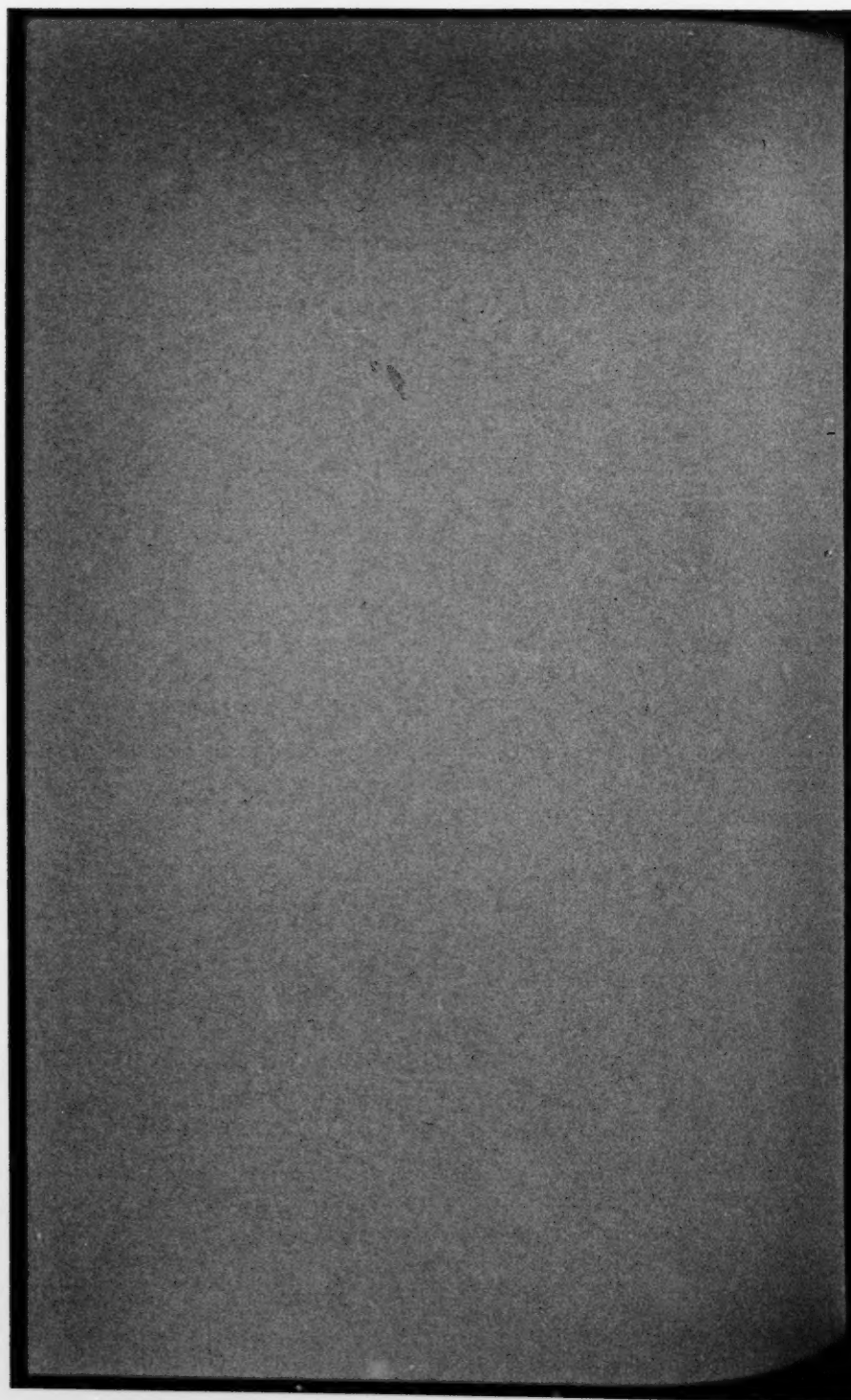
HOUSTON OIL COMPANY OF TEXAS, ET AL,
Respondents

PETITION FOR REHEARING

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PETITION FOR REHEARING

*To the Honorable Chief Justice of the United States
and the Associated Justices of the Supreme
Court of the United States:*

I. Where the Inevitable Result Arising from the Failure of a Federal Court to Make a Finding on a Decisive Issue Presented to It is that One Man's Property has been Given to Another, Even on a Local Question, the Constitutional Requirements of the Due Process of Law as Provided in the Fifth Amendment of the Constitution of the United States have been Invaded and the Jurisdiction of this Court is thereby Invoked.— *Fayerweather v. Ritch*, (N. Y. 1904) 195-U. S. 276, 298, 25 S. Ct. 58, 49 L. Ed. 193.

The necessary result arising from the failure of the Circuit Court of Appeals to make a finding on the questions presented to it, namely,

- (a) Did Thomas H. Pratt forfeit his right to represent the Pratt-Hewit Corporation in the making of the September 28, 1925 contract with the Houston Oil Company, thereby making said contract void ab initio, because of the undisputed many private secret financial dealings he was having with the Houston Oil Company?
- (b) Was the September 28, 1925 contract void and against public policy on its face because of its provisions being prohibited by Texas statutory law?

was to leave the Houston Oil Company unlawfully in possession of the property it had taken from the Pratt-Hewit Corporation under the pretended contract and also to deny the latter an accounting for the oil and gas taken from the property by the former without there having been first a judicial determination of the question presented to the Circuit Court of Appeals, thereby bringing into this litigation at this point the involvement of the Fifth Amendment of the Constitution of the United States in the taking of petitioners' and the Pratt-Hewit Corporation's property without due process of law, thereby invoking the jurisdiction of this Court.

The finding of the Circuit Court of Appeals "that there was no fraud" may not be construed to have decided the jurisdictional questions (a) whether Thomas H. Pratt's secret dealings with the Houston Oil Company disqualified him from representing his company in the making of the September 28, 1925 contract, thus making it void ab initio and (b) wheth-

er the September 28, 1925 contract is on its face prohibited by Texas statutory law and therefore void and against public policy, making the alleged instrument incapable of creating any rights in the Houston Oil Company or anyone else. Nor does the finding of the Circuit Court of Appeals that "the findings and conclusions of the District Court (Tr. R. 507-520) are free from error" contain a finding on the foregoing jurisdictional questions presented to the Circuit Court because the latter are not to be found in the District Court's Findings of Fact and Conclusions of Law.

II. Due Process of Law Requires that there be The Co-existence of Three Things—Notice, Adequate Opportunity of Being Heard, and a Finding on the Issue Presented.

While the courts in their opinions usually in attempting to name the requisites of due process of law, mention Notice and Adequate Opportunity of Being Heard, nevertheless, if the third element, the Finding on the Issue Presented is lacking, the requisites of the Due Process of Law under the Fifth and the Fourteenth Amendments, have not been met. The presence of the third is as necessary to the presence of Due Process of Law as is the third support to the usefulness of a tripod.

Because the courts do not always mention the third element, it does not mean that that is not essential. It is not mentioned because it is rarely absent. But such absence does not militate against its impor-

tance. Merely taking volumes of evidence and making findings on issues other than those which are vital to the question of whether one of the parties has been deprived of his property in violation of the requirements of due process of law, and when the failure to make a finding on the decisive issues in the case necessarily results in depriving one of the parties of his property, such proceeding falls far short of being a judicial determination fulfilling the requirements of the due process of law provision of the Fifth and the Fourteenth Amendments of the United States Constitution and also of Article I, Sect. 19 of the Texas Constitution—"the due course of the law of the land."

Fayerweather v. Ritch (N. Y. 1904) 195 U. S. 276, 298, 25 S. Ct. 58, 49 L. Ed. 193

Syllabus—"Where the appellants' contention is that the Circuit Court, by giving unwarranted effect to a judgment of a state court and accepting that judgment, which contained no finding of one of the fundamental facts as a conclusive determination of that fact, deprived him of his property without due process of law, and that contention is made in good faith, and under the circumstances, upon reasonable grounds, the application of the Constitution is involved and this Court has jurisdiction of a direct appeal from the Circuit Court." Justice Brewer:

"Our jurisdiction of this direct appeal from the decisions of the Circuit Court is invoked on the ground that the case invokes the application of the Constitution of the United States.

"The contention is that by Article V of the

amendments to the Federal Constitution no person can be deprived of life, liberty, or property without due process of law; that these plaintiffs were entitled to large shares of the estate of Daniel v. Fayerweather; that they were deprived of this property by the judgment of the Circuit Court, which gave unwarranted effect to a judgment of the state courts; that this action of the Circuit Court is not to be considered as a mere error in the progress of a trial, but a deprivation of property under the forms of legal procedure.

“In *Chicago, Burlington etc. Railroad v. Chicago*, 166 U. S. 226, we held that a judgment of a state court might be here reviewed if *it operated to deprive a party of his property without due process of law, and that the fact that the parties were properly brought into court and admitted to make defenses was not absolutely conclusive upon the question of due process.*”

(Nature of the case just cited. This was a condemnation proceeding brought under the condemnation statute of Illinois. Notice and opportunity to be heard was given defendant according to the letter of the statutes of Illinois. A jury fixed the just compensation of the various owners whose property had been taken and fixed that of the plaintiff at \$1.00).

“We said (*Chicago, Burlington R. R. Co. v. Chicago* 166 U. S. 226):

‘Nor is the contention that the railroad company has been deprived of its property without due process of *law entirely met by the sugges-*

tion that it had due notice of the proceedings for condemnation, appeared in court, and was admitted to make defense. It is true that this Court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice—the Court having jurisdiction of the subject matter and of the parties, and the defendant having full opportunity to be heard met the requirement of due process of law.

(Note—This paragraph although from the preceding case 166 U. S. 226 precedes the following quotation):

‘But a state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not form. This Court, referring to the 14th Amendment, has said: ‘Can a state make anything due process of law which, by its own legislation, it chooses to declare such?’ To affirm this is to hold that the prohibition of the state is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation. Davidson v. New Orleans, 96 U. S. 97, 102. The same question could be propounded and the same an-

swer should be made, in reference to judicial proceedings inconsistent with the requirements of the due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the 14th Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the State within the meaning of that Amendment.'

"And again (pp. 236, 237) we said:

'The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used in due process of law, if the necessary result be to deprive him of his property without compensation.'

"If a judgment of a state court can be reviewed by this Court upon the ground that, although the forms of law were observed, it necessarily operated to wrongfully deprive a party of his property (as indicated by the decision just referred to) *a judgment of the Circuit Court of the United States, claimed to give such unwarranted effect to a decision of a state court as to accomplish the same result, may also be considered as presenting the question how far it can be sustained in view of the prohibitory language of the Fifth Amendment, and thus involve the application of the Constitution.* It is said that the right of these plaintiffs to share in the estate of Daniel B. Fayerweather is undoubted, unless destroyed by the releases they executed; that the fundamental question presented in the trial court of the state was the validity of the releases; that notwithstanding

this, that Court came to its conclusion and rendered its judgment without any determination thereof; that the appellate courts wrongfully assumed that the trial court had decided the question and rendered their judgments upon that assumption, so that the necessary result of the proceedings in the state courts was a deprivation of the right of the plaintiffs to a share of the estate, without any finding of the vital fact which alone could destroy their right. The contention is not that the state courts erred in their finding in respect to this fact, but that there never was any finding. Such a decision of the state courts, made without any finding of the fundamental fact, was accepted in the Circuit Court of the United States as a conclusive determination of the fact. Although these plaintiffs were parties to the proceedings in the state courts and presented their claim of right, if it be true that the necessary result of the course of procedure in those courts was a denial of their rights—a taking away and depriving them of their property without judicial determination of the fact upon which alone such deprivation could be justified—a case is presented coming directly within the decision in 166 U. S. *supra*. Giving effect in the Circuit Court to the state judgment does not change the character of the question. It is simply adding the force of a new determination to one wrongfully obtained, and adding it upon no new facts. Whether the contention of the plaintiffs in respect to the character of the state proceedings can be sustained or not is a question upon the merits and does not determine the matter of jurisdiction. That depends upon whether there is presented a bona fide and reasonable question of wrongful character of the proceedings in the state courts and the necessary results therefrom. We are of the

opinion that the jurisdiction of the Court must be sustained."

The Court, in its opinion in the foregoing case, very clearly states the reason upon which it took jurisdiction in the following language: "The contention is not that the state courts erred in their finding in respect to this fact, but that *there never was any finding.*"

So in the case at bar in which "there never was any finding" *either in the Circuit or the District Courts*, on the question whether Pratt had disqualified himself from representing his corporation in the making of the September 28, 1925 contract, thereby making the contract void in its attempted inception, and the question whether that contract on its face was prohibited by various Texas statutes and therefore was void and against public policy, and was as though it never existed and therefore was incapable of creating any rights in behalf of the Houston Oil Company or anyone else, the inevitable result coming from the failure of either the District Court or the Circuit Court of Appeals to make a finding on said questions, has resulted in the taking away from the Pratt-Hewit Corporation of one-half of all the property, personal and real, and one-half of the production of oil and gas from said property since 1925 and giving it to the Houston Oil Company, all in violation of the Fifth Amendment of the Constitution of the United States and of Article I, Section 19 of the Constitution of Texas. Furthermore, every day since September 28, 1925, this unlawful taking of oil and gas from the Pratt-Hewit Corporation by the Houston

Oil Company has been going on and is still going on daily i nthe face of all this litigation, making mockery of law and of the courts.

"We may examine proceedings in state courts for appopriation of private property to public purposes so far as to inquire whether a rule of law was adopted in absolute disregard of the owner's right to compensation. If the necessary result was to deprive him of property without just compensation, then due process of law was denied him contrary to the Fourteenth Amendment. Chicago, Burlington & Quincy R. R. Co. v. Chicago, 166 U. S. 226, 246; Backus v. Ritch, 195 U. S. 276, 298. Our concern is not whether to ascertain whether the rule adopted by the state is the one best supported by reason or authority nor with mere errors in the course of trial but with denial of a fundamental right." McCoy v. Union Elevated R. R. Co., 247 U. S. 354, 363 (1917).

III. Discussion of Question, Whether Pratt Had Disqualified Himself from Representing His Company.

The Circuit Court made no finding on the issue that Pratt had placed himself in a position where his personal dealings with the Houston Oil Company had disqualified him ipso facto from representing his corporation in its making of the September 28, 1925 contract, thus making said instrument void. These business dealings are listed and described on pages 9-12 in the petition for certiorari and also on pages 11-18 in the petition for rehearing.

The only findings made by the Circuit Court of Appeals were the following: (a) That "the findings and conclusions of the District Court are free from errors." (b) That there "was no fraud."

The answer to the finding (a) is that the District Court made no finding on that question whatsoever. Therefore, the deficiency of the decision of the Circuit Court of Appeals in its failure to make a finding on the foregoing issue presented to it cannot be remedied by falling back on the findings of fact and conclusions of law of the District Court, on which issue they are silent. See the Findings of Fact and Conclusions of Law which are to be found on pages 509-520 of the Transcript of Record.

Finding (b) "that there was no fraud" does not constitute a finding on the question whether Pratt's private personal dealings with the Houston Oil Company, which are not and cannot be disputed, put Pratt in a position where his private interests conflicted or tended to conflict with the duty he owed his corporation and its stockholders, thereby making void the September 28, 1925 contract.

It was charged in the second amended complaint that Pratt, as an officer and director of the Pratt-Hewit Corporation, could not place himself in a position where his own private interest would make him neglectful of his obligation to his stockholders; that Pratt's personal dealings with the Houston Oil Company made the September 28, 1925 contract illegal and void; that at no time (said instrument) became

a valid contract but was iniquitous and void in its inception,"; that the Houston Oil Company did not acquire a property right in the property of which it took possession, by virtue of said instrument, but that equity impressed said property with a constructive trust with the Houston Oil Company as constructive trustee, and the Pratt-Hewit Corporation as cestui que trust. (Tr. R. 338)

During the trial of the case the Court made the remark "Now they don't deny the execution of those instruments. There is no dispute about it. . . . " To which counsel replied "The gist of this action is this:—that an officer of a corporation cannot have interests which will conflict with the duties of the corporation. He cannot represent the Pratt-Hewit Corporation and be receiving these sums of money from the Houston Oil Company at the same time." (Tr. R. 721-723) (Pet. Certiorari 59)

Likewise, the issue that Pratt had disqualified himself from representing his corporation in attempting to negotiate the September 28, 1925 contract in behalf of his corporation with the Houston Oil Company, by virtue of his secret dealings with the Houston Oil Company and that company's abetting him in this with its money made the contract void, was argued extensively at the hearing of this case in the Circuit Court of Appeals and discussed at length in appellants' brief filed with that court.

The term "fraud" is a conclusion of law arising from a fact or series of facts which can be infinite in

number. However, there is one thing certain. It cannot be tortured to include the mere act of a fiduciary placing himself in a position which would excite conflict between self interest and duty, because that occurs very frequently without any fraud or fraudulent intent accompanying it. Yet the forfeiture of the right of representation by the fiduciary of a beneficiary must immediately give way when such conflict arises "to the stern demands of loyalty." Such is the decision of this Court in the case of *West v. Camden*, 135 U. S. 507, 10 S. Ct. 838, 34 L. Ed. 254.

In that case of *West v. Camden*, the agreement was one made personally by Camden, a director and stockholder of a corporation, that West should be permanently retained as vice-president of that company at a salary of \$5,000 a year. It was not an agreement of the corporation itself. Inasmuch as its breach might readily be presumed to result in the personal liability of Camden for damages, the agreement was of a character to place defendant's personal interests in possible conflict with the best interests of the corporation and its stockholders, and, as plaintiff knowingly dealt with defendant with respect to the subject matter touching his fiduciary relationship to the stockholders, the contract was manifestly void, not because a *fraud was perpetrated or contemplated*, but because the contract was against public policy, even though there would not have been any direct gain to the promisor, the defendant.

The facts thus clearly disclose that this contract was against public policy and void for one sole reason, that is, it placed defendant's interest in direct conflict with the duty he owed to his corporation's stockholders.

In the case of *Nabours v. McCord*, 80 S. W. 595, the Supreme Court of Texas said:

"No man can in this court, as an agent, be allowed to put himself into a position in which his interest and his duty will conflict." p. 600.

"The court will not inquire, and is not in a position to ascertain, whether the bank had lost or not lost by the act of the directors." p. 600.

The Supreme Court of Texas in the same case gives the reason why the law must be such in a relationship between a fiduciary and his beneficiary when that Court said:

"The rule is founded on the danger of imposition and the presumption of the existence of fraud inaccessible to the eye of the court. The policy of the rule is to shut the door against temptation, and which, in the cases in which such relationship exists, is deemed to be itself sufficient to create the disqualification." *Nabours v. McCord*, 80 S. W. 595, 598, 599 (Tex. Sup. Ct.)

Justice Cardozi in *Wendt v. Fischer*, 243 N. Y. 328, 443, 154 N. E. 303, 304, said that the instant that the conflict of interest with duty arises "the law

'does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, (conflict of self-interest with duty) and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case.'

"The Court's uncompromising adherence to the rule of undivided loyalty 'does not rest upon the narrow ground of inquiry or damage to the corporation resulting from a betrayal of confidence, but upon broader foundations of a wise public policy that, for the purpose of removing all temptation, extinguish all possibility of profit flowing from a breach of the confidence imposed by fiduciary relation . . . a constructive trust is the remedial device through which precedence of self is compelled to give way to the stern demands of loyalty.' *Guft v. Loft Inc.*, Del. Supp., 5 A (2d) 503, 510. 'The rule based on public policy of removing temptation completely from the office of a fiduciary, so that it will not be necessary to determine whether it was the interest of the trustee or his sense of duty which prevailed.' *Blaustein v. Pan American Pet. & Transpt. Co.*, 21 N.Y.S. (2d) 651." *Overfield v. Pennroad Corp.*, 42 F. Supp. 586, 608.

For further authorities and discussion see pages 33-42 in the petition for certiorari.

The uncompromising adherence to the principle involved in the foregoing question which the Circuit

Court of Appeals failed to answer lies at the base of every form of fiduciary relationship and arises frequently in American jurisprudence and as said in *Bailey et al v. Jacobs*, 325, Pa. 187, 189 Atl. 320, "Indeed upon them rests the entire structure of the law of corporate administration."

True, the foregoing is local law. But when the Circuit Court of Appeals failed to pass upon the issue just discussed and the District Court also, with the result that the Houston Oil Company was permitted to retain the property it had unlawfully taken from the Pratt-Hewit Corporation, the silence of the Circuit Court of Appeals effectuated the taking of the Pratt-Hewit Corporation's property by the Houston Oil Company in violation of the Fifth Amendment of the Constitution of the United States and of Sect. 19, Article 1 of the Texas Constitution.

IV. The Inevitable Result Arising from the Failure of the Circuit Court of Appeals to Make Any Findings on the Two Issues is Also to Deprive the Pratt-Hewit Corporation and the Petitioners of their Property in Violation of the "due course of the law of the land" of the Bill of Rights of the Constitution of Texas, Article 1, Sect. 19.

The result arising from the failure of the Circuit Court to make a finding on the two issues that have been discussed herein, namely, the taking of the Pratt-Hewit Oil Corporation's and its stockholders' property by the Houston Oil Company through the pretended September 28, 1925 contract, is a taking of property of the Pratt-Hewit Corporation in vio-

lation of the Texas Bill of Rights in its Constitution, Article 1, Section 19, as well as a violation of the Due Process clause of the Fifth Amendment of the United States Constitution. Furthermore, in result, the decision of the Circuit Court of Appeals has made the Texas Statutory law nugatory as to Usury, Anti-Trust, Monopoly, and Corporate law as to petitioners and the Pratt-Hewit Corporation in this litigation, thus raising a conflict between Circuit Court decision and Texas Statutes.

“No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.” Bill of Rights, Constitution of Texas, Art. 1, Sec. 19.

In the case of *Armstrong v. Traylor, et al*, 30 S. W. 440 the Supreme Court of Texas explained the meaning of the phrase “except by the due course of the law of the land” as used in Art. I Sect. 19 of the Texas Constitution, in the language of Mr. Cooley in his work on Constitutional Limitations, page 432:

“By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial.”

From this it clearly appears that, in order that the requirements of “due course of the law of the land” as used in the Texas Bill of Rights, Art. I, Section 19 and the “due process of law” in the Fifth and Fourteenth Amendments of the Constitution of the United States are met, there must be rendered by the

Court a specific judgment or finding on the issue presented to it.

In the case of *State v. Humble Oil & Refining Company*, 263 S. W., p. 319, 323 (Tex. Civ. App. Error Refused), among other contentions of the State of Texas, there was the following—the attorney general of Texas contended that inasmuch as the Standard Oil Company of New Jersey in a previous case in Hunt County, Texas, had been charged with violating the Anti-Trust laws of that state, an agreed judgment had been entered finding it guilty of violation of the Anti-Trust laws of Texas, but a money judgment or fine of \$500,000 and costs was the only punishment assessed by said judgment; that that agreed judgment by virtue of Article 7803 of the Revised Statutes of Texas barred said Standard Oil Company of New Jersey from doing any business in the State of Texas. The Humble Oil and Refining Company is a subsidiary of the Standard Oil Company of New Jersey and therefore the state contended that the former was the alter ego of the New Jersey Standard Oil Company and therefore the disqualification of the latter to do business in Texas by virtue of its plea of guilty and said Article 7803 of the Revised Statutes of Texas was imputed to the Humble Oil and Refining Company.

The Humble Oil & Refining Company's answer in general was that in the agreed judgment there was nothing that would take away from the Standard Oil Company of New Jersey the right to do business in Texas. Therefore, inasmuch as that company is a

Texas corporation, the denial of its right to do business in Texas by virtue of a statutory enactment by its rights as guaranteed to it not only by the Constitution of Texas but by the 14th Amendment of the Constitution of the United States.

The Court said (page 323): "No opportunity of having a trial on the issue enjoining the Standard Oil Company thereafter from doing business in Texas was given or contemplated, since only an agreed judgment was entered. It is therefore clear that, no judgment having been entered upon the direct issue of forfeiture of the right of said foreign corporation to do business in Texas, it follows that the Constitution would not countenance the passage of a statute which would forfeit such right without the opportunity of a hearing and a trial upon such issue directly.

"A similar question to this was passed upon by the Supreme Court in the case of *Steddum v. Kirby Lbr. Co.*, 110 Tex. 525, 221 S. W. 920. The procedure applicable to the case at bar is that a divorce was granted a husband upon the ground that his wife was guilty of adultery. The decree entered granted the divorce upon the specific ground of adultery. Under the statute then in force a wife who was found guilty of adultery forfeited her interest in the community property. The court decreeing the divorce did not declare her rights in the community property forfeited, although it decreed the divorce upon the ground of adultery. The children after the death of the divorced wife instituted suit for the recovery of her interest in the community property; hence the question before the Su-

preme Court, and it disposed of it by the use of the following language:

“Whatever may have been the rule under the laws in force in the Republic at the time of the divorce decree with respect to a wife’s adultery operating as a forfeiture of her interest in the community property, we are unwilling to hold that under the Constitution of the Republic such a forfeiture could have resulted from a mere divorce proceeding, or could have been decreed otherwise than in a direct proceeding for the purpose of declaring the forfeiture, with full opportunity on the part of the wife to be heard. A wife against whom such a forfeiture was sought would have been entitled to a trial upon the direct issue. Such a decree without the opportunity of having such a trial would not have been countenanced by that Constitution.’

“We think this decision conclusive of the question here raised. The Constitution of the Republic of Texas under which the above proceeding was had was practically identical with section 19 of the Bill of Rights of our present Constitution, and practically the same as the “due process of law” provision of the Fourteenth Amendment to the Constitution of the United States.”

The Court in the foregoing case said that a forfeiture of land may not be decreed except “in a *direct* proceeding for the purpose of declaring the forfeiture” and the party against whom the forfeiture is sought “is entitled to a trial upon the *direct* issue.” When the result of a judgment is to effectuate a taking of property from one person and giving it to an-

other, such judgment must be based upon a *direct* issue presented to the Court and the Court must make a *direct* finding upon such issue and what has been decided may not be left to implications, indirection, and speculation before it meets the constitutional requirements of the due process of law.

V. A Discussion of the Second Issue Presented to the Circuit Court of Appeals, as to Which the Court Failed to Make a Finding—Whether the September 28, 1925, Contract was Void and Against Public Policy because Prohibited by the Statutes of Texas.

There was presented to the Circuit Court the issue that the September 28, 1925 contract is void on its face in that it shows that it is prohibited by the statutes of Texas and is therefore also against public policy. This contract is Exhibit 4 and is to be found on pages 876-887 of the Transcript of Record.

“It is well said that a contract which the law denounces as void is necessarily no contract whatever and the acts of parties in an effort to create one in nowise bring about a change in legal status. A void contract is a mere nullity, and is obligatory on neither party to it. ‘It requires no disaffirmance to avoid it and cannot be validated by ratification.’” *Limestone Co. v. Knox et al*, 234 S. W. 131, 134.

The September 28, 1925 contract is void because:

(a) It delegates all managerial powers which the Pratt-Hewitt Oil Corporation directors and officials possessed, by virtue of its charter under the laws of

Texas, to the directors and officials of its competitor, the Houston Oil Company. This question is discussed on pages 25-30 inclusive in the petition for rehearing in the Circuit Court and in the petition for certiorari on pages 42-48 and where Texas and Delaware applicable statutes are quoted.

(b) It violates the Texas Usury Statute. This is a loan contract whereby the Houston Oil Company extended a number of loans to the Pratt-Hewit Corporation, carrying interest at 6% and secured by lien on all of the latter's property, and in addition required the Pratt-Hewit Corporation without any consideration to convey to the Houston Oil Company an undivided $\frac{1}{2}$ interest in all its properties. This is discussed in the Petition for Rehearing on pages 22-25 and in the Petition for Certiorari on pages 48-52 and where Texas Usury Statutes are quoted.

(c) It violates the Texas Anti-Trust and Monopoly Statutes. The contract put all the production and marketing of the oil and gas produced on the Pratt-Hewit properties under the absolute control of the officials of that Corporation's competitor, the Houston Oil Company. This is discussed in the Petition for Rehearing on pages 22-25 and in the Petition for Certiorari on pages 52-56 and where Texas Monopoly and Anti-Trust laws are quoted.

The foregoing issues, standing by themselves, are questions as to local law in Texas and do not pertain to Federal law. Assuming that the Circuit Court of Appeals had stated and made a direct finding on

each question in the negative, no Federal question would then be presented.

However, when the Circuit Court of Appeals failed to make a finding on all or any one or more of these questions and when the result of such silence inescapably takes one-half of all the property owned by the Pratt-Hewitt Corporation, and gives it to the Houston Oil Company, then there has been a taking of one man's property and giving it to another in violation of the due process clause of the Fifth Amendment of the United States Constitution and of Article I, Section 19 of the Texas Constitution.

When it becomes the duty of a court to make a finding on a decisive issue in a case presented to it and the Court fails to make such finding and as a result, one party is deprived of property which is given to another, that failure to act involves the due process clause of the Fifth Amendment of the Constitution of the United States and also Article I, Section 19 of the Texas Constitution and if it occurs in a state court it violates the 14th Amendment. In either case it invokes the jurisdiction of this Court.

VI. The Undecided, Unanswered Issues Presented to the Circuit Court of Appeals Raise Jurisdictional Questions. Making a Finding on these Issues was the Court's Duty.

The two issues presented to the Circuit Court of Appeals which the Court failed to adjudicate, namely, first, that Thomas H. Pratt had disqualified

himself from representing his company by having secret dealings with the Houston Oil Company, and the second, that the September 28, 1925 contract, on its face, showed that it was void and against public policy in that the instrument is contrary to and prohibited by the several statutes, each representing a jurisdictional question, made their adjudication the first duty of the Circuit Court of Appeals.

A void contract "is a mere nullity and is obligatory on neither party to it." *Limestone Co. v. Knox et al, supra*. Therefore, any attempt by courts to predicate judgments on it necessarily are also void and nullities.

The Texas courts have said that a void judgment is "an absolute nullity; and all acts performed under it are nullities. Again, it has been said to be in law no judgment at all, having no force or effect, conferring no rights, and binding nobody. It is good nowhere and bad everywhere, neither lapse of time nor judicial action can impart validity. It is not susceptible of ratification or confirmation, and its invalidity may not be waived." (25 Tex. Jur. Sec. 254, p. 693.)

If the September 28, 1925 contract is void on its face, then the judgment of the District Court is void and the affirmance of said void judgment of the District Court is beyond the jurisdiction of the Circuit Court of Appeals.

"A party may always suggest that the court

lacks jurisdiction of the subject matter, or the court may raise that question of its own initiative ('28 U.S.C. Sec. 80 places a duty upon the court to dismiss or remand an action where the court lacks jurisdiction of the subject matter.' Footnote)." Moore's Fed. Prac. Vol. 1, p. 662.

"It is the duty of a federal court to determine a question of its jurisdiction sua sponte, though not raised by either party. U. S. Iowa 1867, Riggs v. Johnson County, 73 U. S. 166, 6 Wall 166, 18 L. Ed. 768 and other cases cited." 20 F. D. p. 725 Sec. 280 (5).

"The want of equity jurisdiction of the district court, if obvious, may and should be objected to by the court of its own motion. Twist v. Prairie Oil Co., 274 U. S. 684, 690." Matthews v. Rodgers, 284 U. S. 521, 524.

The inevitable result arising from the refusal of the Circuit Court is that the Pratt-Hewit Oil Corporation has been deprived of its property which was unlawfully taken possession of by the Houston Oil Company under the pretended September 28, 1925 contract in violation of the Fifth Amendment of the Constitution of the United States and of Article I, Section 19 of the Texas Constitution.

The plain fact of it is, as litigation now stands, the Pratt-Hewit Corporation and its stockholders have been deprived of $\frac{1}{2}$ interest in their 23,000 acres of oil and gas leases now having approximately 70 producing wells (Tr. of R. 709), a $\frac{1}{2}$ interest in the oil and gas taken from said property since September 28, 1925, a $\frac{1}{2}$ interest in all the other personal prop-

erty, together with a deprivation of their right to produce and market their own gas and oil as would seem best in their own judgment, said right to manage their own company's affairs, which have been unlawfully delegated to the officers and directors of the Houston Oil Company, all brought about by the Circuit Court of Appeals in its decision that "there was no fraud" and "the finding of the District Court was free from error," and without making a finding upon the jurisdictional terminative issues as to which the existence or non-existence of fraud is immaterial, which issues were presented to the Circuit Court of Appeals and whose direct finding alone could justify a taking of this property from the Pratt-Hewitt Corporation and its stockholders and giving it to the Houston Oil Company.

As said before, this is not a taking which occurred merely some time in the past but has been going on ever since September 28, 1925, and is going on right now in the face of this litigation pending in this Court. Unless this Court takes jurisdiction, the unanswered two decisive, jurisdictional questions and issues remain undecided and unadjudicated.

Petitioners do not want to be understood as contending that the error complained of is that there has been no adjudication in favor of them on the merits of the issues presented to the Circuit Court of Appeals but that there has been a *denial by the Circuit Court of the right* to a finding on those issues as is guaranteed to them and their corporation and its stockholders, not only by the Fifth Amendment of the

United States Constitution, but equally so by Article 1, Section 19 of the Texas Constitution—a finding that is not merely a speculative inference or innuendo, but, as the Supreme Court of Texas said in *State v. Humble Oil & Refining Company*, supra, a direct finding “upon the direct issue.”

Wherefore, upon the foregoing grounds, it is respectfully urged that the petition for rehearing be granted and that the judgment of the Circuit Court of Appeals be upon further consideration reversed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, one of the counsels for the above-named appellant, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

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